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Supreme Court of the United States

OCTOBER TERM, 1962

No. 901

ADELA VACHIER,
PETITIONER,

v.

McCORMICK, ALCAIDE & CO.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Now comes the petitioner and through her undersigned counsel, Carlos D. Vazquez, Esq., respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment rendered by the Supreme Court of Puerto Rico affirming the dismissal of the complaint in an action for revendication entered by the Superior Court of Puerto Rico, San Juan Part, and in support of this petition she alleges:

(a) Opinions of the Courts Below.

(A copy of the official translation into English of the opinions of the Supreme Court of Puerto Rico and of the Superior Court of Puerto Rico, San Juan Part, which as yet have not been officially reported, are attached to this petition as appendix thereof.)

(b) Jurisdiction of This Court.

The judgment sought to be reviewed was rendered and entered on December 7, 1962, and the jurisdiction of this Court is invoked on the authority of Pub. L. 87-189, Sec. 1, Aug. 30, 1961, 75 Stat. 417, 28 USCA 1258, and 62 Stat. 961, as amended, 28 USCA 2101.

(c) Question Presented for Review.

The question presented for review stems from an action of revendication filed by the petitioner in the Superior Court of Puerto Rico, San Juan Part, to recover 7.40 cuerdas of land which were separated by the current of Rio Grande de Loiza upon changing its channel, from a property belonging to the petitioner which was bounded on the south by the river, joining them and causing them to be adjacent to respondent's tenement on the northern part of the river.

The Superior Court as well as the Supreme Court of Puerto Rico decided that said 7.40 cuerdas were lost by the petitioner and acquired by the respondent, gratuitously, by virtue of the right of accession.

Therefore, the question to be reviewed by this Hon. Supreme Court boils down to the following:

Does the judgment rendered by the Supreme Court of Puerto Rico violate the principle sanctioned by the Four-

teenth Amendment of the Federal Constitution and Sections 7 and 9 of Article II of the Commonwealth Constitution to the effect that no person shall be deprived of his property without due process of law and solely for public use, upon payment of a reasonable compensation fixed in the manner provided by law?

(d) The Federal and Commonwealth Constitutions and Statutes of Puerto Rico Involved Are:

(1) The Fourteenth Amendment of the Federal Constitution.

(2) Section 7 of Article II of the Constitution of the Commonwealth of Puerto Rico:

> "No person shall be deprived of his liberty or property without due process of law." 1 L.P.R.A. p. 180.

(3) Section 9 of said Article II of the Constitution of the Commonwealth of Puerto Rico:

> "Private property shall not be taken or damaged for public use except upon payment of just compensation and in the manner provided by law." 1 L.P.R.A. p. 181.

(4) Section 282 of the Civil Code of Puerto Rico:

> "No person shall be deprived of his ownership except it be by a competent authority and for a justified purpose of public utility or social benefit, and upon payment of just compensation which shall be fixed in the manner provided by law." 31 L.P.R.A. sec. 1113, p. 586.

(5) Section 302 of the Civil Code of Puerto Rico:

"The augmentation which the banks of a river gradually receive from the effects of the current of waters belongs to the owners of the tenements adjacent to such banks." 31 L.P.R.A. sec. 1169.

(6) Section 47 of the Law of Waters of Puerto Rico:

"The gradual increase of lands adjoining creeks, streams, rivers, and lakes caused by accretion or detritus shall belong to the riparian owners. Mineral sediments which are to be used as such must be applied for in accordance with the provisions of the mining laws." 12 L.P.R.A. sec. 638.

(7) Section 309 of the Civil Code of Puerto Rico:

"When the current of a river divides itself into branches, leaving a tenement or a part thereof isolated, the owner of such tenement retains his ownership. He also retains it, if a piece of land becomes separated by the current." 31 L.P.R.A. sec. 1176.

(8) Section 304 of the Civil Code of Puerto Rico:

"When the current of a river, rivulet or torrent cuts off from a tenement on its bank a known portion of land and transfers it to another tenement, the owner of the tenement to which the portion cut off belongs retains the ownership of such portion." 31 L.P.R.A. sec. 1171.

(9) Section 305 of the Civil Code of Puerto Rico:

"Trees uprooted and carried away by the current of waters belong to the owner of the land upon which they are carried, if the former owners do not claim them within a month. If such owners claim them, they shall pay the expenses caused by the collecting and securing of the same in a safe place." 31 L.P.R.A. sec. 1172.

(e) Statement of the Case.

This is an action of revendication which was decided against the petitioner by judgment of the Superior Court of Puerto Rico, San Juan Part.

The suit was submitted to the decision of the trial court on documentary evidence consisting of plats of the properties in controversy, aerial maps of the region where the properties are located and on verbal stipulations made by the parties at a pretrial conference held on January 20, 1960, which were taken down by a stenographer and made a part of the record before this Supreme Court. (R. 13-17)

At the request of both parties the Court also made an inspection of the land in controversy.

The facts stipulated by the parties and which are established by the documentary evidence may be summarized briefly in the following manner:

The petitioner is the owner of a property which is described in the first paragraph of the "Questions of Fact and of Law" of the Superior Court and the respondent owns the one described in the second paragraph of said conclusions. (R. 19-21)

When on November 26, 1948 the petitioner acquired her property, the land of the parties in this case had the Rio Grande de Loiza as their common boundary, respondent's being on the northern side of the river and petitioner's on the southern side.

With the running of the years, the river, without the intervention of the work of man, gradually changed its course towards the south, encroaching upon petitioner's land and establishing a new channel. As a result of this change the parcel of land measuring 7.40 cuerdas claimed by the petitioner and which is a part of her property, was left north of the river, adjacent to appellant's property and isolated and separated by the river from the rest of

her property. Notwithstanding this contiguity and that they appear as a single body of land, the portion of 7.40 cuerdas is easily identifiable and as a question of fact was delimited from the original property of the appellant by the stipulations of the parties stating their area, metes and bounds in order to avoid any discussion as to its identity. (R. 15-16)

Based on the theory that the parcel of 7.40 cuerdas increased its property by fluvial accession, the respondent took possession thereof and in order to recover same the petitioner filed the action of revendication in the Superior Court.

Relying on the provisions of Section 302 of the Civil Code of Puerto Rico and Section 47 of the Law of Waters, which we copied on p. 4, of this petition, said Court dismissed petitioner's complaint. The latter appealed from said judgment to the Supreme Court of Puerto Rico which, with two dissenting votes and a non-participating vote, affirmed the judgment on the same grounds adduced by the trial court to dismiss the action of revendication.

The petitioner then moved the Supreme Court of Puerto Rico to reconsider its judgment. In the motion for reconsideration she textually alleged:

> "The interpretation given by this Court to Section 302 of the Civil Code and its failure to decide the controversy herein by applying the clear provisions of Section 309 of the same Code, render unconstitutional the rule of law applied herein because it is in open conflict with the provisions of the Constitutions of the United States and of the Commonwealth of Puerto Rico previously copied. The application of the aforesaid provision in the manner it has been construed deprives the plaintiff of her property, not for public purposes, without just compensation and without due

process of law, thereby violating the constitutional provisions copied above.

"This situation of unconstitutionality may be avoided by reconciling the provisions of Section 302 with those of Section 309 of the Civil Code." (R. 97)

The Supreme Court of Puerto Rico, with the division of Court already indicated, denied on January 28, 1963 the motion for reconsideration, without hearing the parties as to the merits thereof.

(f) Reasons for Granting the Writ

The question posed herein is novel in this jurisdiction. It is decided for the first time in its entire history by the highest court of Puerto Rico and the decision appealed from may be of dire consequences for all the citizens of a country of a low economy and in which 2,500,000 inhabitants contend for the property of an area of only 360 square miles.

The question of whether as a result of the construction applied to a provision of the Civil Code of Puerto Rico, a citizen of this Island may be deprived, without compensation, of 7.40 cuerdas of land, to be adjudicated to another, gratuitously, for his sole and exclusive benefit, by an alleged right of accession, may probably be the object of a decision by this Hon. Supreme Court of the United States in conflict with the judgment rendered by the Supreme Court of Puerto Rico.

It should be borne in mind that what the river did was to divide petitioner's property into two portions one of which, the one measuring 7.40 cuerdas which was located at the southern part of the river, was moved to the northern part, placing it next to respondent's property and, conse-

quently, adjacent to it. The other portion remained south of the river.

The Superior Court as well as the Supreme Court of Puerto Rico decided that the respondent had become the owner of said parcel by right of accession, applying, erroneously in our judgment and in the judgment of the dissenting justices of the latter court, the provisions of Section 302 of the Civil Code of Puerto Rico and Section 47 of the Law of Waters which we have copied above. (Ante p. 4.)

The legal provisions mentioned above do nothing more than embody and vest with the character of positive law the principle in civil law known as accession by alluvion. Alluvion consists of new land (res nova) which is formed on the banks of the rivers by the successive sedimentation or accumulation of particles of land, sand, stone or gravel carried by its currents.

We copy here the definition given to the term alluvion by the Superior Court in its opinion:

> "Alluvion is the gradual increase received by property bordering the rivers, caused by the current of the waters which deposit on said property, silt, mud, branches and particles snatched from others." Caso y Cervecera, *Diccionario de Derecho Privado*, p. 328. (R. 5-6)

And Puig Pena in III *Tratado de Derecho Civil Espanol* 121 defines it as "sediment carried by the currents of water to the banks of the river."

The ownership of this new land (res nova) thus formed is granted by law to the owner of the increased bank, among other reasons, because the owner of the particles composing said increase is not known. So that as a question of necessity and justice, the law adjudicates these increments

of alluvion to the owners of the increased banks. III Manresa, *Comentarios al Código Civil Español* 323, sixth edition, commenting Section 366 of the Spanish Civil Code, equivalent to our Section 302.

In the majority opinion of the Supreme Court of Puerto Rico the following quotation is copied:

> "The lands of new formation are formed at the expense of the other riparians; would it not be fair that these riparians be compensated for this slow expropriation caused by the action of the waters? The law does not grant them any compensation because it is impossible to determine who are the riparians that have gained what the others have lost. When a river flows from one shore to another, it is well known who is the benefited proprietor, but no one knows what direction is followed by the particles of earth carried away by the waters from the riparian proprietor; and in the case of alluvion, properly speaking, it is not known either from which fields the insensible increases which enrich ones at the expense of others are derived. Hence, it is impossible to apply the maxim of equity which prohibits the enrichment of one at the expense of another."
>
> VI Laurent, *Principios de Derecho Civil Frances* 444.

See also Puig Pena, ibid, 116; II Castan, *Derecho Civil Español Comun y Foral* 235, 9th ed.; III Puig Brutau, *Fundamentos de Derecho Civil* 215 (1953).

By the same token, when the waters snatch a *known* portion of land and transport it to another tenement, the owner retains its ownership. (Sec. 304 Civil Code—avulsion case, ante p. 4.)

But, as stated by Justices Rigau and Ramirez in their dissenting opinion, "the case at bar does not involve 'sediments carried by the currents to the shores of the river bed.' This is not the case of new property, recently formed, of *res nova*, free to be taken by someone. Nor is it land of unknown origin *without a known owner*, which must be added to the property of the adjacent owner. It is a parcel of 7.40 cuerdas which already existed in 1935 when the respondent acquired the property; it is property that in 1948 was acquired by plaintiff as part of the property purchased by her at that time.

"What has happened is that formerly the river passed on the northern side of that parcel, and as a result of having changed its course, today it passes on the southern side thereof."

Since the parcel in question is a piece of land of identification accepted by the parties and having a known owner, we believe that the court erred in deciding the case by applying the provisions of Section 302 of the Civil Code.

The problem here is that the parcel of land claimed by the petitioner has been isolated or separated from the rest of the main property by the current of the river. This situation is specifically governed by Section 309 of the Civil Code (ante p. 4). When this happens said legal provision expressly prescribes that the owner of the portion separated retains its ownership. "Instead of being a case of accession it is a rule meant to reaffirm the right of the proprietor who already was such owner of the portion separated." Puig Brutau, *op. cit.*, p. 233 in fine. VI Scaevola, *Codigo Civil* 640-41, 5th Ed.; 1 Pedreira Castro, *El Codigo Civil a Traves de la Jurisprudencia* 498; Puig Pena, *op. cit.*, p. 128; Castan, *op. cit.*, p. 241; Manresa, *op. cit.*, p. 266.

To adjudicate to a person a piece of land which is clearly identified by area, courses, degrees and distances, of known

owner, constitutes a flagrant violation of the equitable maxim that prohibits the enrichment at the expense of others and of the aforesaid constitutional provisions.

We resist here the impulse to copy those paragraphs of the minority opinion which reconcile admirably the provisions of Section 302 and 309 of the Civil Code of Puerto Rico, in their application to this case, in such a manner as to overcome the constitutional questions raised. Said opinion is copied at length in the Appendix, on p. 35 of this petition and we highly recommend the justices of this Honorable Supreme Court to give a careful perusal.

(g) Conclusion

For the reasons stated the petitioner prays that the writ of certiorari sought be issued and that the judgment of the Supreme Court of Puerto Rico be reversed.

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I HEREBY CERTIFY: That a true and faithful copy of this petition, as well as of the record in this case, attached therewith, have been personally delivered to Mr. Felix Ochoteco, Jr., counsel for respondent, at his office situated in the Banco Popular Building, San Juan, Puerto Rico.

CARLOS D. VAZQUEZ
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San Juan, Puerto Rico
Counsel for Petitioner

Appendix

English Official Translation of the Opinion of the Supreme Court of Puerto Rico.

English Official Translation of the Judgment of the Supreme Court of Puerto Rico.

English Official Translation of the Dissenting Opinion of Justices Rigau and Ramirez of the Supreme Court of Puerto Rico.

English Official Translation of the Opinion of the Superior Court of Puerto Rico, San Juan Part.

IN THE SUPREME COURT OF PUERTO RICO

No. 318
Writ of Review

ADELA VACHIER,
Plaintiff-appellant,
v.
McCORMICK, ALCAIDE & CO.,
Defendant-appellee.

OPINION OF THE COURT DELIVERED BY MR. JUSTICE DAVILA
SAN JUAN, PUERTO RICO, DECEMBER 7, 1962

The Rio Grande of Loiza is a common boundary between the lands of the parties in this litigation. The plaintiff is the owner of a property south of the river. The defendant of one to the north. With the flow of time and of the waters of the river, the erosive action of the current has changed the course of the river at the expense of plaintiff's lands. This process has been developing gradually since the year 1914 and at the time that this complaint was filed, August 8, 1958, defendant's property had increased its area by 7.40 cuerdas. To revendicate this portion of land plaintiff filed the present suit.

The trial court dismissed the action relying on the provision of § 302 of the Civil Code, 31 LPRA § 1169. This provision provides that "The augmentation which the banks of a river gradually receive from the effects of the current of waters belongs to the owners of the tenements adjacent to such banks." The plaintiff maintains that the application of that provision is erroneous. She maintains that the second part of § 309 of the same Code, 31 LPRA § 1176 is the applicable provision. Said section provides in full: "When the current of a river divides itself into branches, leaving a tenement or a part thereof isolated, the owner of such tenement retains his ownership. *He also retains it, if a piece of land becomes separated by the current.*" (Plaintiff's italics to indicate the part that should be applied.)

The Civil Code dedicates §§ 302 to 309, both inclusive, to regulate the relations between the persons who possess lands bordering bodies of water. In each case it establishes to whom the lands affected by the changes of the body of water belongs. The phenomenon of accession of soil may take place in four different ways, to wit: (a) by alluvion;[1] (b) by avulsion;[2] (c) by change of channel or course of a

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[1] It is regulated by § 302 which was applied by the trial judge in disposing of the present case and which we have set out in the text of the opinion. Section 303 — 31 LPRA § 1170 — establishes the rights of the person who possesses lands adjacent to ponds or lakes and provides thus:

"The owners of tenements adjacent to ponds or lakes do not acquire the land left dry by the natural decrease of the waters nor lose that inundated thereby in unusual floods."

[2] It is regulated by §§ 304 — 31 LPRA § 1171 — and 305 — 31 LPRA § 1172 — which provide:

"Sec. 304. When the current of a river, rivulet or torrent cuts off from a tenement on its bank a known portion of land and transfers it to another tenement, the owner of the tenement to which the portion cut off belongs retains the ownership of such portion.

"Sec. 305. Trees uprooted and carried away by the current of waters belong to the owner of the land upon which they are

river;[3] (d) by formation of islands.[4] Ways (a), (b) and (d) are regulated by provisions taken from the Spanish Civil Code, while the (c) modality was adopted from the Civil Code of Louisiana, § 306, and from Spain, § 307.

We shall consider in the first place the provision applied in deciding this case and then turn to the provision which appellant alleges should be applied.

Section 302 of our Civil Code—equivalent to § 366 of the Spanish Code—sanctions an ancient and traditional mode of acquisition. Without expressly using the word, the aforesaid section incorporates into the Code what the Romans called "alluvio" and which in our language is known as alluvion. Alluvion is defined as "the increase of land

carried, if the former owners do not claim them within a month. If such owners claim them, they shall pay the expenses caused by the collecting and securing of the same in a safe place."

Referring to this mode Pedregal, in his *Comentarios al Codigo Espanol* 585, footnote 1 (Madrid, 1889), criticizes this section inasmuch as ". . . it happens so very seldom and even in the event, which is very problematic, that it should happen, it shall be so unusual that the prejudiced landowner better take care in going to gather and remove his land to the point of origin or to another . . . lest such action be labelled as true calculations."

[3] The change of channel is regulated by §§ 306 — 31 LPRA § 1173 — and 307 — 31 LPRA § 1174 — which read thus:

"Sec. 306. If a river or stream, whether navigable or not, opens itself a new bed by leaving its former channel, the owners of the soil newly occupied shall take, by way of indemnification, the former bed of the river, every one in proportion to the quantity of land he has lost.

"The said owners shall have the right to their former property if the river or stream returns to its former channel."

"Sec. 307. When a new bed is opened through a private tenement by a navigable river, which changes its course through natural causes, the said bed shall become part of the public domain. The owner of the tenement shall recover the same, in the event of the waters leaving it again dry, whether by natural means or through labor unlawfully authorized for this purpose."

[4] The rights appertaining to the islands thus formed are regulated by §§ 308 — 31 LPRA § 1175 — and 309 — 31 LPRA § 1176 — (copied in the text of the opinion).

"Sec. 308. Islands which, through successive accumulations of descending alluviums, are slowly formed in rivers, belong to

which is successively and imperceptibly formed on the banks or shores of the river." II *Enciclopedia Espanola de Derecho y Administracion* 580, *Aluvion* (Madrid 1849). And in that same text on p. 581 it continues saying: "The alluvion, considered as a means of acquiring property, is a right of citizens and it belongs with that class of rights which, as we said in the article entitled Acquisition, are deemed to be primary or primitive. Emperor Justinian himself, accepting the doctrine of Gaius, the jurist, expressly confirmed this when he said: 'Praeterea quod per alluvionem agro tuo flumen adjecit jure gentium tibi adquiritur.' However, this did not cause it to be known in the ancient legislation of that nation nor did it become established until the glorious era of Emperor Justinian, when an answer of Cassius, the jurist, which was later adopted as a rule, to a consultation made by the riparian landowners of the Po as to increases on some fields to the prejudice of others, gave rise to the legislation approved in this connection."

In the Roman law the rule was expressed thus:

> "Alluvion means a latent increment . . . What is added by alluvion to the land becomes of the same nature thereof . . . It is considered as added by alluvion what is added so gradually that you cannot tell how much is added at any moment of time . . . What is added to our land by alluvion belong to us . . ." 2 Oyuelos *Digesto*, p. 105 (Madrid 1917).

The Wise King incorporated the rule adopting the cardinal idea set forth in the Roman Law. Thus, Title 28, of Partida III, states:

> the owners of the banks or shores nearest to each of them, or to those of both shores if the island is in the middle of the river, and they shall then be divided longitudinally in halves. If a single island thus formed be more distant from one bank than from the other, then the owner of the nearest bank shall be the sole owner thereof."

"Rivers sometimes swell to such a height, that they carry away a portion of one estate, and join it to another, situated elsewhere, on their banks. Wherefore we say, that the earth which a river carries away from an estate, little by little, and imperceptibly, because not all in a body, becomes the property of him to whose estate it is carried, and he who lost it, has no claim whatever to it."

The same principle appears in the Napoleonic Code. Section 566 of said Code provides:

"The accumulations and increase of mud formed successively and imperceptibly [5] on the soil bordering on a river or other stream, is denominated '*alluvion.*'

"Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one admitting floats, or not; on condition, in the first case, of leaving a landing-place or towing-path conformably to regulations."

This mode of acquisition has been universally accepted. "This ruling of the Roman law has the universal endorsement of all the legislations. All, without exception, confirm it. . . " 2 Falcon, *Codigo Civil Espanol* 52 (Madrid 1889). In America it appears, among others, in the Codes of Argentina, art. 2572; Bolivia, art. 301 (it contains very explicit language in providing: "The increases formed successively and imperceptibly on the shores of the river by the action of the waters are called alluvion. Alluvion benefits the riparian proprietor without the owner of the opposite side being able to claim the land he may have

[5] The Spanish lawmaker instead of using the concept "successively and imperceptibly" to describe the alluvial increases used the concept "gradually." The Partidas used "little by little." The concept "little by little" or "gradually" is more precise. And actually it has been interpreted that "imperceptibly" insofar as alluvial formations are concerned, is equivalent to "gradually." *Brighton & Howe General Gas Co.* v. *Howe Bungalows*, 1 Ch. 372, 13 B. R. C. 183 (1924).

lost"); Brazil, art. 538; Colombia, art. 719; Cuba, art. 366; Chile, art. 650; El Salvador, art. 631; Louisiana, art. 509; Mexico, art. 908; Quebec, art. 420; Uruguay, art. 752.

In England, Bracton defined it thus:

> "Alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees, that it cannot be perceived at what moment of time it is added; for although you fix your eyesight upon it for a whole day, the infirmity of sight cannot appreciate such subtle increments, as may be seen in the case of a gourd, and such like."

Hence, it was accepted as a fundamental principle of the common law. *R.* v. *Lord Yarborough*, 5 Bing. 163 (1828); 1 Eng. Rul. Cas. 458. The provision bequeathed to us by the Rome of classic times that the alluvion belongs to the owner of the land to which it attaches is accepted in India. In the case of *Clarke* v. *Edmonton*, 4 D.L.R. 1010 (Can 1929), the Supreme Court of Canada quotes from the case of *Sri Balsu Ramalaskmamma* v. *Collector of Godaveri District*, L.R. 26 Ind. Appl. 107 (1899), as follows: "There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land which attracts it; but the rule, though unwritten, is equally well established." That was the law in pre-revolutionary Russia. 1 Pedregal, *Codigo Civil Espanol Comentado* 584 (Madrid 1889). It prevails in the jurisdictions of the federal states of the American Union. *Ford* v. *Turner*, 142 So. 2d 335 (Fla. 1962); *Heikkinnen* v. *Hansen*, 360 P.2d (Wash. 1961); *Wyatt* v. *Wycough*, 341 S.W. 2d 18 (Ark. 1961); *Freiland* v. *Pennsylvania R. Co.*, 47 A.H. 745 (Penn. 1901); *Willet* v. *Miller*, 55 P.2d 90 (Okla. 1936); *Hubbard* v. *Manwell*, 14 A.H. 693 (Vt. 1888); *State of Kansas* v. *Meriwether et al.*, 182 F. 457 (8th Cir. 1910); *Abott* v. *City of Fort Madison*, 108 N.W. 2d 263 (Iowa 1961); *Nelsey* v. *McCormick et al.*, 18 N.Y. 147 (1858).

Underhill, *Determination of Rights Along the Missouri River*, 42 Iowa L. Rev. 58 (1956); Annotation, *The Law of Accretion to Shore Lands*, 58 L.R.A. 193 (1901).

As to the justification for this rule which for so many years has governed the relations of riparian proprietors, which rule we have seen has been generally and universally adopted since ancient times, Bonel y Sanchez in their work II-2 *Codigo Civil Espanol* 171 (Barcelona 1890), say:

> "This article provides what was treated in Rome under the term alluvionem in par. 20, tit. 1, book 2 of the Institutes of Justinian and was later reproduced in Law 26, tit. 28, Partida III: Quod per alluvionem agro tuo flumen adjecit jure gentium tibi adquiritur, pursuant to the paragraph cited, giving an idea or defining what was meant by alluvion thus: Est autem alluvio incrementum latens quod ita paulatim adjicitur, etc. The term incrementum latens alone would be sufficient to indicate the extent of the alluvio., and the judicial sense that said accession embodied, so that said phrase is reproduced in our local laws without it having any similarity to any of the other provisions of our ancient codes and such definition embodies the idea that by the right of the citizens a tenement acquires the increases which it imperceptibly receives even if at the expense of its adjacent owners. Hence the aforesaid Partida, translating this definition, states that everything the river carries away from an estate, little by little, and imperceptibly, because not all in a body, becomes the property of him to whose estate it is carried, and he who lost it has no claim whatever to it; and it is to the benefit of all the proprietors to accept mutually those insensible changes, which some commentators regard as inescapable effects of a tacit aleatory agreement with Nature."

Laurent, in VI *Principios de Derecho Civil Frances* 423 (Mexico 1895), states:

"Portalis will give us the reason for these provisions. In ancient law there was a struggle between the riparian landowners, the State, and the gentlemen of high justice. According to several customs the riparian took advantage of the alluvion, and others attributed it to the king when the river was navigable and to the gentlemen of high justice when it was not navigable. The riparians were sacrificed by a majority of the textwriters. Portalis says that the alluvion should belong to the riparian proprietor by virtue of the natural maxim that the benefit belongs to whomever runs the risk. Some riparian properties run a greater risk than others. There exists, so to speak, an aleatory contract between the riparian proprietor and nature; whose march may at every instant reduce or increase said tenement. In that sense it is said that rivers give and take as does fortune . . ."

On this point Maaresa states in III *Comentarios al Codigo Civil* 323 (7th ed., Madrid 1952):

"But there is still another reason which has been opportunely advanced by F. Ricci, the Italian textwriter. It grows out of the agricultural industry's own interest, which requires that accretion by alluvion should belong to the riparian proprietor. Who, indeed, can better cultivate and benefit from the alluvial land than the proprietor himself to whose land it has attached? To assign to someone else a strip of land formed by alluvion, apart from the fact that, as a general rule, it could not be cultivated as a separate unit, it would be necessary to impose on the riparian proprietor the new burden of a servitude, in order to facilitate the enjoyment of the former, which, besides

being unjust, would give rise to suits and controversies."

In the case of *Morgan* v. *Livingston*, 6 Martin's Reports (O. S.) 19 (1819), the Supreme Court of Louisiana stated at p. 242:

"Alluvion is a mode of acquiring property by natural law, jure gentium, by those principles or maxims which regulated the conduct of men, before the formation of civil society.

"The Roman jurists, as Grotius informs us, proved this to be a natural right, from the maxim it is just that the advantages of any thing should belong to him who supports its disadvantages.

"This opinion of the Roman jurists seems to prevail in France. 'Equity,' says Brillon, 'requires that he who suffers the incommodity, should reap the advantages. As nothing is more prejudicial than the vicinity of a river, which inundates, submerges, and deteriorates the neighboring fields, nothing is more just than that the proprietor, to whom the stream has often borne prejudice, should conserve, in exclusion to all others, when it becomes beneficent, a gift, less a gain than a reparation, less a present than an exchange.'

"The right of increase by alluvion is grounded on the maxim of law which bestowes the profit and advantages of a thing upon him who is exposed to suffer its damages and losses."

See also: *Succession of Delarchaise* v. *Haginnis*, 11 So. 715 (La. 1892) and *Miami Corporation* v. *State*, 173 So. 315 (La. 1936).

The Supreme Court of the Republic of Colombia expressed itself thus, in a decision copied in the annotation to §719 of its Civil Code contained in Jorge Ortega Torres, *Codigo Civil Anotado* (Bogota 1957):

"The reasons that have given rise to the doctrine of accession by alluvion explain the need for the aforesaid requirements and help to indicate and determine the exact field of application of said institution.

"These reasons are: a) in the first place the lawmaker meant to establish in favor of the riparian proprietors a compensation for the risk they run by reason of the fact that their land borders on the water; b) in the second place the law meant to prevent that riparian proprietors, whose condition as such proprietors is to their benefit, should be deprived from that benefit by virtue of a natural fact."

The Supreme Court of the Republic of Colombia gives another reason. It is of incalculable benefit for a property owner to border on a river which may serve as a water trough for his cattle as well as for other agricultural purposes. If the law did not grant him the right to acquire the alluvion, this would set up a barrier between his tenement and the river, thereby depriving him of the benefits derived from a bordering on the river. See also *Lamprey v. Mitcalf*, 53 N. W. 1139 (Minn. 1893); *Cortes v. City of Manila*, 10 Phil. Rep. 567, 579 (1908); VI Scaevola, *Codigo Civil* 602-605 (5th ed., Madrid 1949); II Valverde, *Tratado de Derecho Civil Espanol* 97 (4th ed. Valladolid 1936); 2 Oynelos, *op. cit.*, at p. 106.

It having been established that the acquisition by alluvion is generally accepted, we must now explain how it operates. In he *Enciclopedia Espanola de Derecho v. Administracion*, ante p. 580, it is said:

"We have said that alluvion consists in the imperceptible and successive increase of land on the property adjacent to the banks of a river, which takes place with the lapse of time. This definition is the strictest and most common acception of the word alluvion; but it is likewise used by the commentators of the law

to designate the increment attached to the land on one side of the river when the latter upon changing or abandoning its course, little by little, so that it cannot be perceived, leaves behind a dry part of its channel . . .

"The French Code, the English and almost all modern legislation which have adopted the Roman doctrine on this point, have not only acknowledged and taken the word *alluvion* in the first concept, that is, in the sense of a slow and imperceptible increase of the riparian tenements, but also in the second, that is, when the river recedes along one of its shores and leaves the other side dry. The French Code, with which almost all modern writers are in agreement concerning this matter, provides in its sec. 557 that relictions occasioned by a running stream retiring insensibly from one of its banks, and encroaching on the other, belong to the proprietor of the bank discovered by right of alluvion."

Thus it was interpreted in Spain in our time. To that effect Gayoso Arias, in an article appearing in XII *Revista de Derecho Privado* 617 (1925), entitled *Casos de Accesion Natural*, states:

". . . the increase must be attached gradually to the tenement bordering on the bank, and it must be attached by the action of the current. However, this action may consist either of sedimentation or recession, as we have seen, and hence, both most be slow, insensible, in order that it may come under the scope of said provision."

See to the same effect the commentary of Portalis, State Counsel, in the Statement of Policy of the Code Napoleon, *El Codigo de Napoleon, Curso de Legislacion* (Barcelona 1839).

The provision under consideration requires that the in-

crease benefiting a riparian be gradual. No authority expresses with more preciseness what this term means in relation to alluvion, as does the Federal Supreme Court in the case of *County of St. Clair* v. *Lovingston*, 90 U. S. 46 (1874), after considering the Roman law, the Code Napoleon, the common law as it prevails in England and the states of the American Union, and the Spanish law as set forth in Partida III, title 28, Law 56, *supra*, to conclude that it is a principle of universal acceptance. The Court states thus:

> "In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. . . . The riparian right to future alluvion . . . is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the changes of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his . . ."

To the same effect, see *Clarke* v. *Edmonton*, *supra*. The *Lovingston* case was cited as a precedent in *Kansas* v. *Missouri*, 322 U. S. 213 (1944), when the court stated:

> "The States are not in dispute about the applicable law. They agree that when changes take place by

the slow and gradual process of accretion the boundary moves with the shifting in the main channel's course. Likewise, they agree that a sudden or avulsive change in that course does not move the boundary, but leaves it where the channel formerly had run."

In *Kansas* v. *Missouri*, *supra*, the former claimed from the latter two thousand acres of land. It alleged that they belonged to its jurisdiction and that they had become a part of the State of Missouri because of an abrupt change of channel of the Missouri river. The parties, as we stated above, accepted that the law is analogous to the applicable law governing individuals. The Court, after considering the entire evidence, decided in favor of Missouri because the change in the river's channel was gradual and imperceptible.

As to the requirement that the increase be gradual and imperceptible, Laurent states at p. 423 of the aforesaid text that "in vain it is said that because the increase is insensible it is for that same reason imperceptible. The alluvion is insensible in the sense that it is not noticed when it is formed; but it is very perceptible, because otherwise its possession would not be disputed." And at p. 439: "It is conceived that since the alluvial deposits are formed insensibly, they should belong by right of accession to the riparian proprietors; but although they are successive and imperceptible, these increases are at times very considerable." "There are alluvions which turn out to be larger than the principal tenement," p. 444. "The lands of new formation are formed at the expense of the other riparians; would it not be [illegible] that these riparians be compensated for this slow expropriation caused by the action of waters? The law does not grant them any compensation because it is impossible to determine who are the riparians that have gained what the others have lost. When a river flows from one shore to another, it is well

known who is the benefited proprietor, but no one knows what direction is followed by the particles of earth carried away by the waters from the riparian proprietor; and in the case of alluvion, properly speaking, it is not known either from which fields the insensible increases which enrich ones at the expense of others are derived. Hence it is impossible to apply the maxim of equity which prohibits the enrichment of one at the expense of another."

Now, what are the requirements that should be present in order that a landowner may claim the increases to the area of his property caused by the change of course of a river which is the common boundary with another property? Santamaria in his work *Comentarios al Codigo Civil* (Madrid 1958) sets them forth succinctly citing Gay de Montella:

> "There are three precise general conditions for claiming an alluvion on a tenement bordering a stream, according to Gay de Montella (I *Tratado de la Legislacion de Aguas* 199 (1956), to wit: (a) the tenement should have as its boundary the same river or stream channel; (b) that the deposit or land abandoned by the waters which constitutes the alluvion be attached to the bank or shore and form an integral part of the riparian tenement, and (c) that this deposit be formed slowly or imperceptibly, by the action of nature and not by the action of man."[6]

After examining the evidence presented to the trial judge, we shall immediately notice that in the present case all three conditions required for alluvion exist. The boundary of defendant's property is the Rio Grande of Loiza;

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[6] It has been held that there is no ". . . obstacle, according to the doctrine, for a proprietor to be definitively favored by work done in defense of his property, such as plantations, fences or surfacings . . . . provided he does not invade the bed." Puig Pena, III-1 *Tratado de Derecho Civil Espanol.*

the portion of land in dispute forms an integral part of defendant's property. Using the words of the trial judge "the parcel claimed has merged with defendant's property." The controlling fact in cases of alluvion is that the increase to the property as a result of the change of the river's channel be gradual, as it was established by the Roman law and sanctioned by our Civil Code, that it be formed little by little as determined by the Wise King, or imperceptibly as provided by other legislation and the common law. And, that the increase in the case at bar has been so, is clearly revealed by the evidence presented by both parties. The river has changed its course gradually, imperceptibly, little by little. The increase has been formed little by little, gradually —it commenced in 1914— it has been by action of the river and in it the hand of man has taken no part. As stated by the trial court, "In the change of the river's channel neither party has taken part."

The fact that the exact area which has come to form part of the defendant's property may be determined because the courses and distances of the portion of land in controversy herein may be established is of no significance. What is important and controlling is that the process of increment be gradual, caused by the action of the course of the waters; that the deposits or land abandoned by the waters which constitute the alluvion be attached to the banks or shore and form an integral part of the riparian property.

In the cases of accession by alluvion due to the change of the river's channel and its encroachment upon the lands of the property situated on the opposite side of the river, the increment on the gainful tenement has been at the expense of the opposite tenement. By reason of the erosive force of the current, the bed of the river is displaced leaving dry the former bed on which the flow of the river

deposits particles of earth, sand, and stone which it carries from tenements located from up river. This portion of land thus formed is annexed to the adjacent land. If this process is slow, gradual, imperceptible to the eyes, when it is sought to be observed from day to day, it is a typical case of alluvion. In a majority of these cases it could be determined, by surveys carried out during the years in which the river has been changing its channel, by plats drawn up and by the testimony of persons who know the community, what part of the perimeter of the increased tenement formed part of the tenement on the opposite side of the river. But the law, universally accepted adjudicates to the riparian property the benefit of the increases that gradually and imperceptibly have enlarged the tenement at the time when such increases have not yet been identified because of the imperceptibility of its formation, and once adjudicated, the owner of the favored tenement should not lose, because of the fact that with the lapse of years they may become a considerable alluvial increment, what the law has periodically adjudicated to him.

In the case of *Clarke* v. *Edmonton*, *supra*, the Supreme Court of Canada held that alluvion was proper even if the increment was identifiable. To support its position it cited, among others, an Irish case. Citing from the opinion of Judge Gibson in the case of *A-G* v. *M'Cartha*, 2 Ir. R., 288-289 (1911), "each insensible addition attaches to the principal land, and though in result, the aggregate of additions may show a substantial enlargement of the original territory, this cannot displace retrospectively the ownership of the previous minute accruing accretions. In other words, where the increase is imperceptible in its progress, that increase becomes the property of the owner to whose land it attaches as it is formed; it is vested in him *de die in diem* and no additional increase resulting from

flood conditions can deprive the owner of the increase which had already vested in him."

In the case of *Brighton & Howe General Gas Co.* v. *Howe Bungalows*, 1 Ch. 372, 13 Br. Rul. Cas. 183 (1924)), the question in issue was whether to grant accession by alluvion, if the increase could be identified. The general accepted rule was that the increment by alluvion profits the tenement to which it is attached, but it was alleged that it was so "where no other person can show a title to that soil." The court refuted this contention and stated that "So qualified, the general rule, whether in relation to natural or to artificial accretion, becomes a mere platitude."

As we have previously stated, the increment by alluvion may be caused by sediments of the soil that the current carries or by the insensible recession of the water from one shore to the opposite. Commenting on the alluvial formation and considering the aspect of whether the proprietor of the adversely affected tenement could claim from the proprietor favored by the alluvion, Ruggiero in 1 *Instituciones de Derecho Civil* 618 (Madrid), upon considering the provisions corresponding to the Italian Code maintains that:

> "Patrimonial settlements between landowners of those shores that have been washed away or covered by the waters and those who are favored by the increment do not lie; the former cannot, not even when (as in the second of both figures) the loss suffered may be easily recognized, claim from the opposite shore the land it has lost."

The Supreme Court of Philippines in *Canas* v. *Tuason*, 5 Phil. Rep. 688 (1906), had a similar question brought before it for consideration. The owner of a property bordering a river claimed as her own a parcel of land of 30 hectares (equivalent to 76.33 cuerdas) which by the action

of the San Mateo River had become part of the property situated on the opposite side of the river. The parcel in controversy was situated thirty years prior to the filing of the action as forming part of plaintiff's property. The decision rendered was against plaintiff under the authority of section 366 of the Philippine Civil Code, concomitant to the same section of the Spanish Code and to section 302 of our Code. Section 368 treating on the phenomenon of avulsion was invoked and upon refusing to apply it the court stated: "No witness declared that any of the pieces so separated had been carried to the other side of the river. This fact alone shows that the testimony of the witnesses is not sufficient to bring the case under article 368. Although a piece of land of the size of a hectare may have been separated from Mariquina, yet if it were destroyed by the river and were not carried to Payatas, article 368 would not apply. We are inclined to think that what the witnesses observed was, as testified by one or two of them, that the bank was eaten away every year to a certain extent by the river; that is, that the river, to use the word employed by counsel for the appellants in their brief, destroyed the bank of the river. From the evidence in the case it is impossible to say that the current of this river has separated from the Mariquina estate a known parcel of land and has transported it to the Payatas side. The mere fact that thirty years ago the land now in question was on the Mariquina side of the river is not sufficient to prove that article 368 is applicable."

As stated by the Supreme Court of Philippines, it is unimportant whether the current carries away a considerable piece of land, if it is dissolved, as it generally happens, and is carried down river. To that effect the Supreme Court of the United States has expressed the following in the case of *Nebraska* v. *Iowa*, 143 U. S. 359 (1892) at p. 369:

". . . two things must be borne in mind, familiar to all dwellers on the banks of the Missouri River, and disclosed by the testimony: that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the 'muddy' Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible reaction of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other."

See also Laurent, *op. cit.*, p. 423.

In California where, as we have said, a similar provision to our Sec. 302 exists, the question has been given the same treatment. *O'Connor* v. *Rumiano Brothers Company*, 321 P. 2d 122 (Cal. 1958). The Federal Supreme Court had a similar question before it for consideration and it decided it in like manner, recognizing the right of the owner of the riparian property which had been increased by alluvion. *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178 (1890). See also Judgment of the Supreme Court of Spain of May 4, 1928, 183 Civ. Jur. 606.

We now turn to consider the provision that plaintiff-appellant maintains should have been applied. We said that it was the second part of Sec. 309 of the Civil Code which provides: "When the current of a river divides itself into branches, leaving a tenement or a part thereof isolated, the owner of such tenement retains his ownership. *He also retains it, if a piece of land becomes separated by the current.*"

In support of her theory the plaintiff reads isolatedly the second part of the section as if it were a separate provision without any relation to the preceding statement. If we were to consider it that way we would find that on one hand Sec. 302 grants to the owner of the tenement benefited by the alluvial increments the ownership thereof, while the separate provision invoked by plaintiff denies it.

All the commentators who study the corresponding provision of the Spanish Civil Code, invoked by plaintiff—the second part of our Sec. 309 equivalent to Sec. 374 of the Spanish Codes—do so under the concept of formation of islands. They all consider that that part of the invoked section governs a specie of island formation; when a portion of land is abruptly separated from the property affected adversely by the current, the detached portion remaining isolated in the bed of the river. Scaevola comments the second part of Sec. 374 thus:

"Another modality that may be presented by the formation of islands, decides the second part of the section under analysis. The islands mentioned therein admit as a cause a detachment or separation of part of the land of the adjacent property, which portion arises in the middle of the river. It is, therefore, a case analogous to the avulsion or manifest force of the river. Indeed upon commenting sec. 368 we noticed that for such a situation to exist it was not necessary that the known portion of land be annexed to the property on the opposite side. Even if said portion is formed in the middle of the channel, as long as it meets the requirement of being known by its composition and aspect and by revealing the owner in whose possession it has been, it shall remain the property of the latter. *Well, this equitable rule is embodied in the second part of sec. 374.*" (Italics ours.) 6 Scaevola, *Codigo Civil* 640-41 (5th ed. 1949).

And upon commenting Sec. 373, equivalent to 308 of our Code, Scaevola states at p. 634:

"There are several kinds of islands: those that form a delta, governed by section 374 and those that remain floating on the surface of the water, whose land belongs to their original owners, as long as its instability does not cease; *this latter kind of islands is the one to which section 374 refers, when it provides that the owner of the property retains the ownership of the portion of the land separated therefrom by the current.*" (Italics ours.)

Section 374 is similarly construed by Manresa, *op. cit.*, p. 359; III Puig Brutau, *Fundamentos de Derecho Civil* 233 (Barcelona 1933); II Borell y Soler, *Derecho Civil Espanol* 231 (Barcelona 1955); 2 Castan, *Derecho Civil Espanol Comun y Foral* 241 (9th ed., Madrid 1957); 2 Valverde, *Tratado de Derecho Civil Espanol* 103-105 (4th

ed., Valladolid 1936) and III Sanchez Roman, *Estudios de Derecho Civil* 144-45 (Madrid 1900). See also Padilla, *Codigo Civil Anotado* 622 (Manila 1953).

Hence, we reach the inescapable conclusion that the provision of Sec. 309 invoked by appellant is not applicable to the facts of this case.

No words seem more appropriate for application to the facts presented by this case than those expressed by Judge Estey of the Supreme Court of Canada in his individual opinion in the case of *Queens County* v. *Cooper*, 4. D.L.R. 705, 719 (1946). In this case the situation was the opposite of the one in the case at bar. The owner of the tenement increased by the alluvion brought an action to prevent the defendant from interfering with the peaceful enjoyment of the increment added to his tenement.

> "The relative positions of the appellant and the respondent have been determined by nature. The appellant here has been fortunate, the respondent unfortunate. Sometimes nature favours one and sometimes another, but such are changes incidental to the soil abuting upon a body of water. The law recognizes such changes as inevitable and adjusts the rights of the parties as and when and to the extent that nature alters their positions. It is the natural process of accretion that has altered the areas . . ."

For the reasons stated, the judgment appealed from is affirmed.

(s) CARLOS V. DAVILA
Associate Justice

IN THE SUPREME COURT OF PUERTO RICO

No. 318

WRIT OF REVIEW

ADELA VACHIER,
Plaintiff-appellant,
v.
McCORMICK, ALCAIDE & CO.,
Defendant-appellee.

JUDGMENT

San Juan, Puerto Rico, December 7, 1962

For the reasons stated in the foregoing opinion, the judgment appealed from rendered by the Superior Court, San Juan Part, on April 8, 1960, is hereby affirmed.

It was so decreed and ordered by the Court as witnesses the signature of the Chief Justice. Mr. Justice Rigau dissented and Mr. Justice Blanco-Lugo took no part herein.

(s) LUIS NEGRON FERNANDEZ
Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

IN THE SUPREME COURT OF PUERTO RICO

No. 318

ADELA VACHIER,
Plaintiff-appellant,

v.

MCCORMICK, ALCAIDE & CO., S. EN C.,
Defendant-appellee.

WRIT OF REVIEW
(Accession)

DISSENTING OPINION OF MR. JUSTICE RIGAU
SAN JUAN, PUERTO RICO, DECEMBER 12, 1962

I regret to dissent from the majority opinion in this case. This is a case of accession but it is also a case of what Ihering, Castan Tobena's and others have called the realization of the law. That is, to take in each the law that is written on paper and make it a reality. The realization is the life of the Law. As Castan has written "the Law is to serve life, or, more exactly, pursues the realization of justice in life" and adds "this realization of the Law may be conceived, and has been actually understood, in various times, in two different ways: as mere *application* of an abstract rule to concrete cases; or as the true and proper realization or elaboration of the Law."[7] Of the two modes mentioned by Castan, I prefer the second and I believe that the court in this case took the path of the first. I believe that it was induced to error by conceptualist jurisprudence of the Nineteenth Century, which jurisprudence pursued

[7] Castan, *Teoria de la Aplicacion e Investigacion del Derecho*, p. 1 (1947), Instituto Editorial Reus, Madrid; III Ihering, *L'esprit du Droit Roman, dans les Diverses Phases de son Developpement*, 15, trad. of Meulenaere, Paris, 1877, and cited in Castan, Ibid.

the form rather than the substance and which was wont to offer specious reasoning to support juridical thinking which actually needed an honest and rational reexamination.[8] But let us turn to facts of the case and we shall return later to this matter which we now lay aside.

I

In the case at bar we had to decide whether natural, immovable and fluvial accession took place. After the trial the case was submitted to the Superior Court on documentary evidence consisting in plats and aerial photographs and on stipulations on which the parties agreed at a pretrial conference. In addition, the court made an inspection of the premises.

The facts proved and stipulated are simple: In 1935 the defendant acquired a property in the municipality of Carolina which was bounded on the south by the river "Rio Grande de Loiza". In 1948 the plaintiff acquired the property located south of defendant's property, so that the river became the common boundary between both estates. The evidence reveals that in the course of several years the river changed its course towards the south entering plaintiff's property and dividing it in such a way as to leave on its northern side a parcel of 7.40 cuerdas of land separated from the main property and which parcel now is adjacent to defendant's property. The trial court expressed it thus:

> "Since the year 1914 the river Rio Grande de Loiza began to change its course gradually, particularly in that region where the parcel of land in dispute is located. Hence, prior to the gradual change of the

[8] Some of those theories had their reason of being when they were born but once their ends were achieved, it became necessary to re-examine them, which has generally been done. For a critique of this jurisprudence of conceptions, see I Pound, Jurisprudence 91-117, West Publ. Co., St. Paul, Minn., 1959.

direction of the river's channel, *the perimeter of land of 7.40 cuerdas described in the preceding paragraph formed part of plaintiff's property and was south of the river, but as a result of said gradual change of direction of the river's course, the perimeter of land of 7.40 cuerdas was gradually separated from the rest* of plaintiff's property and it is at present north of the river and adjacent to defendant's property on its southern side. As we have been able to notice, the river has receded little by little in this region and has been depositing washouts on the banks." Finding of Fact No. 5 of the Superior Court. (Italics ours.)

Defendant has taken possession of the aforesaid parcel. There is no dispute as to its area because its description, size, boundaries, courses and distances were proved and stipulated. The complaint contains a detailed and technical description of this parcel by distances in meters, courses by degrees, etc., which I deem unnecessary to reproduce here. We need only remember the fact.

Plaintiff filed an action of revendication to recover the possession of the aforesaid parcel, to which the defendant objected on the ground that it had acquired said land by right of accession and relied on section 302 of the Civil Code, 31 LPRA sec. 1169, the text of which we shall examine shortly. The trial court accepted the reasoning of the defendant, declared that sections 302 of the Civil Code and 47 of the Law of Waters, 12 LPRA sec. 638, were applicable and dismissed the complaint. To review that judgment plaintiff appealed to the Supreme Court and maintains that section 309, and not section 302 of the Civil Code applies.

The right of accession is governed by a Chapter of the Civil Code which embraces sections 287 to 318 (31 LPRA secs. 1131-1199) and as to the fluvial accession several sections of the Law of Waters contained in the Subchapter of that law entitled "Accretions, Relictions, and Sediments

of Waters," 12 LPRA secs. 631-642, are also applicable. The provisions of the Law of Waters on this matter are similar to those of the Civil Code.

The first section of the Civil Code which governs this matter, sec. 287, provides that "The ownership of property, whether movable or immovable, carries with it the right, by accession, to everything which is produced thereby, or which is united thereto or incorporated therewith, either naturally or artificially." 31 LPRA sec. 1131. Puig Pena explains that the word *accession* comes from the latin word *accessio*, which is in turn derived from *ad* (towards) and *cedo* (to approach), which presupposes the idea of approach of a thing, of *adherence*, of *incorporation*.[9]

Traditionally physical accession has been classified by the civilian writers into two categories, since it might result from a within to outside movement (accession by *production*) or from an outside to within movement (accession by *union*). Accession by union is also known as *continuous* accession. The latter is subdivided into *immovable* or *movable*, according to whether it is formed to benefit an immovable or a movable, and in *natural* and *industrial* or *artificial*, according to whether the increase is due to a natural force or the work of man.[10]

Our Civil Code recognizes, among others, the continuous, immovable, natural and fluvial accession in its four classical forms of alluvion, avulsion (to be defined shortly) or force of river, change of channel and formation of islands. With respect to accession it also provides for lands adjacent to ponds and lakes; also when the current of a river divides itself into branches; and when a portion of land is separated from the main property by the current. In the discussion that follows it will be noted that all these instances which we have mentioned (alluvion, avulsion, etc.) do not bear

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[9] III Puig Pena, *Tratado de Derecho Civil Espanol* 115.

[10] II Castan, *Derecho Civil Espanol, Comun y Foral* 233, 9th ed.

the same consequences with respect to the right of ownership. Some of those physical phenomena produce the juridical accession and others do not; or, in other words, some grant ownership and others do not. On this point the ancient civil law and our present Civil Code and the Law of Waters recognizes the corresponding differences which are dictated by right reason and the sense of justice and equity.

We shall define each one of the cases we have mentioned but we shall consider lastly the cases of alluvion and of land separated from the main property by the current, because those are the two cases involved herein. The *avulsion* takes place when the current of a river, rivulet or torrent, separates from a tenement a known portion of land and moves it to another tenement. In this case the owner of the property to which the segregated portion belongs retains ownership thereof.[11] By avulsion the increase received by the riparian tenement is not due to the sedimentation of the waters.[12] In that case, Manresa says, the law does not permit the effects of accession, because the owner of the segregated portion is known and because the two lands which shall thereafter be adjacent have not merged.[13]

The *change of channel* occurs, as the phrase itself indicates, when because of the natural change of the course of the waters, a river abandons its channel and takes a new one.[14] In this respect section 306 of our Civil Code provides that if a river should open itself a new bed, leaving its former channel, the owners of the soil newly occupied shall take, by way of indemnity, the former bed of the river, every one in proportion to the quantity of land he has lost. 31 LPRA sec. 1173.

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[11] Sec. 304 of the Civil Code, 31 LPRA sec. 1171; Sec. 44 of the Law of Waters, 12 LPRA sec. 635.

[12] Castan, *ibid*, p. 238.

[13] Manresa, *Comentarios al Codigo Civil Espanol* 244, 6th ed.

[14] Secs. 306 and 307, Civil Code, 31 LPRA secs. 1173 and 1174; Secs. 41 and 42, Law of Waters, 12 LPRA secs. 632 and 633.

And the Law of Waters states in its section 41 that the channels of the rivers "which are abandoned through the natural deviation of the course of the waters belong, throughout their entire length, to the owners of the riparian lands. If the abandoned channel separated estates belonging to different owners, the new dividing line shall run at an equal distance from both." 12 LPRA sec. 632.

As to the *land adjacent to ponds and lakes* it is sufficient to state that pursuant to the Civil Code and the Law of Waters the owners of tenements adjacent to ponds or lakes do not acquire the land left dry by the natural decrease of the waters nor lose that inundated thereby in the floods.[15]

The type known as *formation of islands* includes several possibilities: (a) The formation or birth of islands in the seas adjacent to the coasts; (b) the formation of islands in navigable rivers; (c) islands formed in non-navigable rivers by successive accumulation of relictions; (d) islands formed when the current of a river divides itself into branches.[16] Section 371 of the Spanish Civil Code provides that the islands formed in the seas adjacent to the coasts and in navigable rivers belong to the State. As to the islands formed in non-navigable rivers, Sec. 373 of the Spanish Code grants the accession in terms similar to ours. The Puerto Rican Code, Sec. 308, makes no distinction and refers in general to the islands formed "in rivers." It provides:

> "Islands which, through successive accumulations of descending alluviums, are slowly formed in rivers, belong to the owners of the banks or shores nearest

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[15] Sec. 303, Civil Code, 31 LPRA sec. 1170; Sec. 40 Law of Waters, 12 LPRA sec. 631.

[16] Castan, ibid, pp. 240-41; III Puig Brutau, *Fundamentos de Derecho Civil* 233 (1953); Puig Pena, ibid, pp. 126-28; Manresa, ibid, pp. 254-56 and 259-64.

to each of them, or to those of both shores if the island is in the middle of the river, and they shall then be divided longitudinally in halves. If a single island thus formed be more distant from one bank than from the other, then the owner of the nearest bank shall be the sole owner thereof." Sec. 308; 31 LPRA sec. 1175.

The Law of Waters has a similar provision in its section 46; 12 LPRA sec. 637.

We now arrive at the two theoretical situations involved in this case: the alluvion and when a portion of land is separated from the main property by the current of the river. Therefore, we must examine these two cases in detail. *Alluvion* is established in sec. 302 of the Civil Code and sec. 47 of the Law of Waters. It is on this sec. 302 that the defendant relies. The trial court relied on both. The plaintiff relies on sec. 309 of the Civil Code. Let us examine the texts of those sections. Section 302 of the Civil Code (alluvion) provides:

"The argumentation which the banks of a river gradually receive from the effects of the current of waters belongs to the owners of the tenements adjacent to such banks." 31 LPRA sec. 1169. Section 47 of the Law of Waters reads as follows:

"The gradual increase of lands adjoining creeks, streams, rivers, and lakes caused by accretion or detritus shall belong to the riparian owners. Mineral sediments which are to be used as such must be applied for in accordance with the provisions of the mining laws." 12 LPRA sec. 638.

The Civil Code, Section 309, provides for: (a) when the *current of a river divides itself into branches*, and (b) when a portion of land *is separated by the current* from the main property, as follows:

"When the current of a river divides itself into branches, leaving a tenement or a part thereof isolated,

the owner of such tenement retains his ownership. *He also retains it, if a piece of land becomes separated by the current.*" (Italics ours.) 31 LPRA sec. 1176.

The situations pertaining to immovable fluvial accession regulated by positive law and the rules established therefor, once examined, we now ask which is the criterion used by the Civil Code and the Law of Waters to grant or refuse the juridical accession, that is, the right of ownership, in each one of those situations? Except in the case of the islands formed in the sea and in the navigable rivers, which the Spanish Civil Code in good public policy declares to be public property, we may answer the preceding question by saying that the problem hinges on whether or not the natural forces have created a new property, the *res nova* (new thing) of which the civilian writers speak.[17] As a consequence of that criterion or parallel thereto, an important role is also played by the fact of whether the owner of the land in question is known.

Note that in the cases where the waters have not created new territory but a *detachment* has occurred, as in the case of avulsion (sec. 304), or an *isolation* or *separation* of part of the property by the current of the waters (sec. 309), no legal accession takes place; the former owner retains the ownership of the land detached, isolated or separated. On the contrary, juridical accession occurs in those cases where due to the gradual action of the waters (Civil Code) and their *sedimentation* (Law of Waters), *new property* has been created, without a *known owner*, as in the cases of alluvion (sec. 302), and of formation of islands. In other words, the Code does not provide for the dispossession of an owner because of the fortuitous event that a torrent fractioned his property. What the Code does is to establish a series of convenient rules for such cases where the slow

[17] Puig Pena, ibid, p. 116; Castan, ibid, p. 235; Puig Brutau, ibid, p. 215.

sedimentation of the waters has created a *new* surface, adhered and incorporated to a bank or in the middle of a river. Inversely, when the property affected by the action of the waters is old and has an owner (as in the cases of avulsion and separation of land) the owner retains his right of ownership over the land so affected.

The case at bar does not involve "sediments carried by the currents to the shores of the river bed."[18] This is not the case of new property, recently formed, of *res nova*, free to be taken by anyone. Nor is it land of unknown origin without a known owner, which must be added to the property of the adjacent owners. It is a parcel of 7.40 cuerdas which *already existed* in 1935 when respondent acquired the property; it is property that in 1948 was acquired by plaintiff as part of the property purchased by her at that time.

What has happened is that formerly the river passed on the northern side of that parcel, and as a result of having changed its course, today it passes on the southern side thereof. Straining defendant's argument, if the river had invaded further to the south and would now run along the southern boundary of plaintiff's property (as it previously ran along its northern boundary), would that mean that plaintiff would have been left entirely without property and that her whole property would have become the defendant's? The answer is clearly in the negative. Our law does not recognize fluvial expropriation without compensation and for private purposes.

Puig Brutau, in his comment on Section 374 of the Spanish Code (equivalent to 309 of our Code), which deals with a situation like the one at bar, states: "Rather than a case of accession, it is a rule meant to reaffirm the right of the original owner who already was such owner of the

[18] Puig Pena, op. cit., p. 121.

portion separated."[19] The same view is shared by Scaevola,[20] Pedreira Castro,[21] Puig Pena,[22] Castán,[23] and Manresa.[24]

In the inspection made by the trial judge he observed that the land in question had gravel, sand and stone. It is natural that it be so. The river, upon passing for a certain period of time over that land, must have washed away the mould or humus leaving uncovered whatever stones were there; besides it is natural that at the same time it should have deposited sand and gravel. But the controlling fact is that this was done by the river *on land already existing there*: the river did not create those 7.40 cuerdas.

II

My point is that the sections of the Civil Code regulating this matter do not do so arbitrarily: there is a reasoning behind it. That is, when the property affected by the water already exists and has a known owner, the owner retains his property; this is the fair solution. The Code does not authorize the dispossession by the fortuitous action of the waters. Examples of this are the sections previously discussed in this opinion: Sec. 303 (case of ponds), Sec. 304 (avulsion), Sec. 305 (tress carried by the current), Sec. 306 (river that abandons its channel), Sec. 307 (new channel of the river), and Sec. 309 (land isolated or separated by the river). On the contrary, when the waters, by sedimentation, create property which did not exist, the problem arises as to whom is the owner of this new property. The Code provides certain rules to solve the problem. Such are the cases of Secs. 302 (alluvion) and 308 (formation of islands in rivers by accumulation of reliction).

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[19] Puig Brutau, op. cit., p. 233 in fine.
[20] VI Civil Code 640-41, 5th ed.
[21] *El Codigo Civil a Traves de la Jurisprudencia* 498.
[22] Op. cit., p. 128.
[23] Op. cit., p. 241.
[24] Op cit., p. 266.

In the case at bar, as above mentioned, we are dealing with a parcel of land which *existed* there, with *exact* description and dimensions, known to and stipulated by the parties and having a known owner before the defendant took possession thereof. Said parcel was isolated from the main property by the action of the river. To regulate such a situation there is a provision in the Civil Code; an express law based on rational and justice-oriented grounds. It should be noted that the majority opinion begins by declaring that the river has changed its course, which situation is governed by Sec. 309 of the Civil Code. That clear and concrete reality of this case, which we have previously described, cannot be hidden behind a curtain citations, some of which are theoretical discussions in abstract and others, decisions, some suitable to other facts while others are remains of certain jurisprudential tendencies of the old analytical school which (as Pound indicates in his above-mentioned work), was prove to try, not the case, but the theory. As the Supreme Court of the United States has had occasion to point out, the problems brought to the courts are not solved by a collection of citations, but according to the realities of the record: *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69.

The majority opinion sets forth that the author Santamaria enumerates the conditions that should exist in order to establish alluvion and it states that they are (a) that the tenement be riparian, (b) that the alluvion be attached to the tenement and (c) that it be formed naturally and slowly. Based on this enumeration the Court finds that in the case at bar those conditions exist and concludes that therefore it is a case of alluvion. But it omits a condition, which because it is so obvious, it is implied in the discussion of Santamaria and that is that the land to be adjudicated by right of accession cannot be, at any previous time, the of another. If it belongs to another, as in the present case,

there is no juridical alluvion by virtue of sec. 309, as we already explained.

Typically, as it happens when a case is approached exclusively from an analytical standpoint, the majority opinion does not go into the merits of the case. (Is the land occupied by defendant the property of someone else?) Under Sec. 302, is someone dispossessed of his property? Is that just and reasonable? The opinion hinges on one word: the word "gradually" used in Sec. 302. It is not the specific factual situation of the case what seems important, the "important and controlling" fact, say the majority opinion, is that the process be "gradual." I believe that such an interpretation of said section is erroneous. The law does not require that the change of course by a river that isolates a portion of land be *sudden* or *gradual*. A river may change its course at different degrees of speed. Whether the *isolation* of the portion of land be slow or rapid, its owner retains his ownership, Sec. 309. The alluvion, wherever it takes place and forms the *res nova* (which is not the case at bar), shall be gradual because sedimentation is slow by its very nature. The decisive criterion is not, therefore, whether the separation of the portion of land from the main property was rapid or slow, but (1) whether the *res nova* was formed by alluvion (in which case juridical alluvion would take place) or (2) whether what occurred was separation from the main property (in which case the owner of the separated parcel retains his ownership).

What I propose is that those sections of the Civil Code and of the Law of Waters be construed *as a whole* and that their purpose be borne in mind. In construing Sec. 302 apart from the rest of the sections of that chapter of the Civil Code, the Court, in my opinion, reaches an erroneous conclusion. As Holmes would say, "It is a fallacy to break the fagot stick by stick." *Schlitz Brewing Co.*, v. *Houston Ice & Brewing Co.*, 250 U.S. 28, 29 (1919).

Unfortunately, in my opinion, the Court, as if drawn by the magic of the word "gradually" took the path that led it to one of those pitiless decisions of which Justice Cardozo spoke. Since in Cardozo not only the Law but also the English language reached one of its summits, I shall not try to translate the paragraph (into Spanish)[25] and I quote:

> "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity . . . I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices. We should know, if thus informed, that magic words and incantations are as fatal to our science as they are to any other."[26]

Because of the reasons above stated I believe that this is not a case of accession by alluvion but a case in which a portion of land was separated from the main property by the river and the owner should retain his property, pursuant to the provision of Sec. 309 of the Civil Code which is also the just and reasonable thing to do.

I am authorized to state that Mr. Justice Ramírez Bages concurs in this opinion.

(s) Marco A. Rigau
Associate Justice

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[25] Editor's Note: All the opinions of the Supreme Court of Puerto Rico are originally written in Spanish.

[26] Cardozo, *Growth of the Law*, p. 66; also in *Selected Writings of Benjamin N. Cardozo*, ed. by Margaret E. Hall p. 215 (1947).

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN PART
Civil No. 58-4760
Revendication

ADELA VACHIER,
Plaintiff-appellant,
v.
McCORMICK, ALCAIDE & CO., S. EN C.,
Defendant-appellee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action of revendication filed by Adela Vachier against McCormick, Alcaide & Co., S. en C. After a trial in which the parties appeared with their respective counsel, the case was submitted on stipulations of facts presented by the parties and on documentary evidence offered at a pre-trial conference held in chambers. The Court made an inspection on the afternoon of the day of the trial.

As a result of the evidence introduced, of the pleadings and of the stipulations and admissions made by the parties, the Court makes the following findings of fact:

1. By deed No. 78 of November 26, 1948, executed before Notary E.H.F. Dottin, the plaintiff Adela Vachier acquired the property which is described in said deed thus:

> "Rural property situated in Barrio Trujillo Alto within the municipality of Carolina, Puerto Rico. Its area according to its registration was 125 cuerdas, equivalent to 49 hectares, 12 ares, 98 centiares and 75 milliares, but by survey made in September 1934 by engineer Pedros M. Otero, it appeared to have an area of 112 cuerdas and 296 thousandths, equivalent to 44 hectares, 13 ares and 65 centiares. It consists of parcel "A" having 14 cuerdas, and "B" having 20

cuerdas and 68 hundredths, and "E" having 93 cuerdas and 2 hundredths, as described in the plat prepared by surveyor Ignacio Morales on January 31, 1933. It is bounded on the north by Rio Grande de Loiza and land of heirs of Gonzalez; on the east by the same land of heirs of Gonzalez and land of Hilario Maeso, separated by a dirt road which leads to barrio Santa Cruz and in part by land of Central Victoria, Inc.; on the south by land of Central Victoria, Inc. and land of Ignacio Olivero, of Felix Dominguez and other and also of Ignacio Olivero and by the old cemetery of Trujillo Bajo; on the west, it is bounded by the road of barrio Barrazas, which separates it from land of the old church of Trujillo Bajo, by land of Hilario Maeso, separated by the road, by other land which formerly belonged to Ignacio Morales Davila and today belongs to Rafael Vachier Sauble and are described hereafter, by the dirt road of barrio Cacao, by land of the heirs of Gonzalez, and by the brook 'Maracuto,' which separates it from land of heirs of Mariano Hernandez. Standing on this property there is a residential house and three other dwellings for laborers, a stable for cattle, two garages, a hoist with its shed and car and full equipment for the refrigeration and bottling of milk, a grass cutter for the cows, two pumps with their shed, motor and pressure tank to supply water to the residence and full equipment of a farm with utensils, implements and equipment, two molasses tanks, one of concrete and the other of iron; forty cuerdas are planted with sprouts, ten cuerdas more or less, of guinea grass and approximately four cuerdas of elephan grass and merker."

2. By deed No. 16 of August 6, 1935, executed before Notary Joaquin Vendrell Joubert, the defendant Met Cor-

mick, Alcaide & Co., S. en C. acquired the property which is described in said deed as follows:

> "RURAL": Parcel of land of 93 cuerdas 656 thousandths, equivalent to 36 hectares, 78 ares and 85 centiares, situated in Barrio Hoyo Mulas within the Municipality of Carolina, and known with the name of Santa Ana, is bounded: on the east and south by Rio Grande de Loiza; on the north by land of the Municipality of Carolina and by land of Rafael Valles Santos and by the road from Carolina to Canovanas; on the west, by land of Central Victoria."

3. The properties of the parties have a common boundary: Rio Grande de Loiza. Plaintiff's property is bounded on the north by said river. Defendant's property is bounded on the south by the same river. There is no dispute as to the fact that the defendant is at present in possession of all the land embraced up to the shores of the river.

4. The parcel of land of which revendication is sought (shaded area in Exhibit 2 of plaintiff, which is a map prepared by engineer Conrado Abruna), is described as follows:

> "RURAL: Parcel of land situated in barrio Trujillo Bajo of the Municipality of Carolina, with an area of approximately seven (7) cuerdas and forty (40) hundredths. Bounded on the north by the property of McCormick, Alcaide & Co., S. en C., on the south by Rio Grande de Loiza; on the east by the heirs of Gonzalez; and on the west by land of Adela Vachier."

5. Since the year 1914 (see defendant's Exhibit A) the river Rio Grande de Loiza began to change its course gradually, particularly in that region where the parcel of land in dispute is located (see aerial maps which are Exhibits 3, 4, 5, and 6 of plaintiff and B, C, D, and E of defendant). Hence, prior to the gradual change of the direction of the river's channel, the perimeter of land of 7.40 cuerdas

described in the preceding paragraph formed part of plaintiff's property and was south of the river, but as a result of said gradual change of direction of the river's course, the perimeter of land of 7.40 cuerdas was gradually separated from the rest of plaintiff's property and it is at present north of the river and adjacent to defendant's property on its southern side. (See Exhibits 1 and 2 of Plaintiff and Exhibit A of Defendant.) As we have been able to notice, the river has receded little by little in this region and has been depositing washouts on the banks.

6. This perimeter of 7.40 cuerdas consists mostly of relictions of the river, gravel, grit, sand, and stones.

7. In the change of the river's channel neither party has taken part.

On the basis of the foregoing findings of fact the Court reaches the following conclusions of law:

1. The increase received *gradually* by the effects of the current of the waters belongs to the owner of the riparian property. Section 302, Civil Code (31 L.P.R.A. 1169), section 47 of the Law of Waters (12 L.P.R.A. 638). The present case involves one of the modalities of accession resulting from the effect of a current of water known as *alluvion*,[1] that is, the gradual increase received by defendant's property by the action of the current of the water upon the recession of the river. We are not dealing with a case of *avulsion* because it is not a *known* portion of land.[2]

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[1] Caso y Cervera, in their *Diccionario de Derecho Privado*, p. 328, say:

> "(Alluvion) is the gradual increase received by the property bordering the rivers, caused by the current of the waters which deposit on said property, silt, mud, branches and particles snatched from the others."

[2] The same commentators say (at page 85):

> "(Avulsion is the) phenomenon by which a portion of land *snatched* from a property by force is *transported* to another tenement

2. This is not a case either of a change of channel, since in this hypothesis the only dispute is the ownership of the channel abandoned between the State and the owners of the properties adjacent to the abandoned channel. Nor is this a case of formation of islands, because it was not established that the portion claimed had remained isolated by the division into branches of the river, nor that a *known portion* had been segregated from riparian property of the plaintiff.

Judgment will be entered consistent with the foregoing findings of fact and conclusions of law.

Let it be notified.

San Juan, Puerto Rico, April 8, 1960.

(s) Luis R. Polo
Judge

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ment." And they add: "The portion taken must be *known*, that is, *individualized* by its characteristics and by reason of the person to whom the separated portion belongs."

In other words, the *identity* should be established between the parcel *separated* and the parcel *deposited* on the adjacent property, without it being sufficient merely to establish that land has been lost by the action of the waters.

On the other hand, during the inspection we noticed that the parcel claimed has *merged* with defendant's property and forms a continuous whole with the latter.

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Supreme Court of the United States

No. 901

ADELA VACHIER,
PETITIONER,

v.

McCORMICK, ALCAIDE & CO.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

No. 901

ADELA VACHIER,
PETITIONER,

v.

McCORMICK, ALCAIDE & CO.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

(a) Opinions of the Court Below.

The Opinions of the Supreme Court of Puerto Rico (R. 12-47), not yet officially published, and the Opinion of the Supreme Court of Puerto Rico (R. 48-52) unreported, are included in the Appendix to the Petition for Writ of Certiorari.

(b) Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari, hereinafter referred to as "the Petition".

(c) Question Presented.

The only question presented for review by the Petitioner is whether the judgment rendered by the Supreme Court of Puerto Rico violates the 14th Amendment of the Federal Constitution and Sections 7 and 9 of Article II of the Commonwealth Constitution inasmuch as it is alleged by the Petitioner that said judgment deprives her of her property without due process of law and without payment of any compensation therefor.

(d) Statute Involved.

The statutory provisions involved are sections 282, 302, 304, 305 and 309 of the Civil Code of Puerto Rico (31 L.P.R.A., Secs. 1113, 1169, 1171, 1172 and 1176); the 14th Amendment of the Federal Constitution and Sections 7 and 9 of Article II of the Constitution of the Commonwealth of Puerto Rico: (*1 L.P.R.A. 180 and 181*).

(e) Statement of the Case.

The facts involved in the judgment sought to be reviewed are so clearly stated in the first paragraph of the Opinion of the Supreme Court of Puerto Rico (Appendix of Petition, p. 12), that respondent prefers to reproduce it:

> "The Rio Grande of Loiza is a common boundary between the lands of the parties in this litigation. The plaintiff is the owner of a property south of the river. The defendant of one to the north. With the flow of time and of the waters of the river, the erosive action of the current has changed the course of the river at the expense of plaintiff's lands. This process has been developing gradually since the year 1914 and at the

time that this complaint was filed, August 8, 1958, defendant's property had increased its area by 7.40 cuerdas. To revendicate this portion of land plaintiff filed the present suit.

"The trial court dismissed the action relying on the provisions of Sec. 302 of the Civil Code (31 LPRA Sec. 1169".

The Supreme Court of Puerto Rico affirmed the judgment of the Superior Court of Puerto Rico, San Juan Part, which decided that the 7.40 cuerdas were acquired by the respondent by virtue of the right of accession.[1]

(f) Reasons for the Denial of the Writ.

Before proceeding to answer the arguments of the petitioner for the granting of the writ, respondent respectfully submits the following grounds for its denial:

Lack of Any Constitutional Question Regarding the Federal or the Commonwealth Constitutions

1. An examination of the Opinions of the Supreme Court and of the Superior Court of Puerto Rico (R. 12-47) reveals that the petitioner failed to raise in the Superior Court any constitutional point affecting the 14th Amendment of the Federal Constitution or Sections 7 and 9 of Article II of the Constitution of the Commonwealth of Puerto Rico and that she presented her case as one only involving a question of accession under the Civil Code of Puerto Rico.

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[1] "The gradual increase of lands adjoining creeks, streams, rivers, and lakes caused by accretion or decritus shall belong to the riparian owners. Mineral sediments which are to be used as such must be applied for in accordance with the provisions of the mining laws." (12 L.P.R.A., Sec. 638.)

It was in the motion for reconsideration filed before the Supreme Court of Puerto Rico, which did not entertain the same, that petitioner for the first time raised a constitutional question under the statutes mentioned hereinabove.

The constitutional ground set out now by the petitioner is an artificial one purposely elaborated in order to raise an apparent jurisdictional issue before this Supreme Court, in her effort, as a defeated party, to get another hearing: *Magnum Co.* v. *Coty*, 262 U.S. 159-163, although she has had already the benefit of one appellate review of her case before the Supreme Court of Puerto Rico; *Dick* v. *New York Insurance Co.*, 359 U.S. 437-452.

2. Because the petition lacks any federal question of substance or any state or territorial question in any way in conflict with the applicable state or territorial law.

3. The petition in this case only involves a plea to review the facts in controversy as they have been appreciated by the Supreme Court according to the stipulation of facts subscribed by the parties; the weight of the documentary evidence offered by them and the inspection made by the trial judge. Said facts have received the concurrent appreciation of the Supreme Court of Puerto Rico, and the petitioner has disregarded the fact that this Hon. Supreme Court is a court of law and not a court for correction of errors; *United States* v. *Johnston*, 268 U.S. 220, 227; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508; *Grover Mfg. Co.* v. *Linde Co.*, 336 U.S. 271-275; the present case not being one covered by the exception to the rule stated.

4. As the only issue involved in this Writ is one of local law for the determination as to whether Section 309 of the Civil Code of Puerto Rico (*31 L.P.R.A., Sec. 1176*), is of application to the facts that were in controversy as it is claimed by the petitioner, instead of Section 302 of said

Code (31 *L.P.R.A. Sec. 1169*) and Section 47 of the Law of Waters of Puerto Rico, as has been decided by the Courts below, the respondent now tries to raise the question that since the enactment of 28 U.S.C.A. 1258, all local law determinations made by the Supreme Court of Puerto Rico are final for all review purposes by this Supreme Court.

5. That there is no serious legal question involved in the petition, except maybe one of merely academical refinement: *English* v. *Cunningham*, 361 U.S. 905, 907; of no importance to the public interest, the issue involved in the Petition being limited only to the parties in this issue: *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79.

Proof of the accuracy of the foregoing ground is that although the Spanish Code was extended to the islands of Puerto Rico, Cuba, and the Philippines by Royal Decree of July 31, 1889, and took effect in Puerto Rico on January 1, 1890; *Rodriguez* v. *San Miguel*, 4 D.P.R. 101, and *Torres* v. *Rubianes*, 20 D.P.R. 316, and the present revised Civil Code of Puerto Rico became effective on July 1, 1902, *Estate of Morales* v. *Registrar*, 16 D.P.R. 109, and *Buso* v. *Buso*, 18 D.P.R. 964, and the Spanish Law of Waters of June 13, 1879, was extended to Puerto Rico by Royal Order of April 5, 1886, *12 L.P.R.A. 501*, (History Amendments, and Codification of Law Waters) which continued in force with some procedural changes, the instant case is the first one to arise under Sections 302, 304 and 309 of the Civil Code of Puerto Rico, 31 L.P.R.A. 1169, 1171, 1172 and 1176 and under Section 47 of the Law of Waters of Puerto Rico, *12 L.P.R.A. 638*.[2]

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[2] Sections 302, 304, 305 and 309 and Civil Code of Puerto Rico correspond to Sections 366, 368, 369 and 374 of the Spanish Civil Code and Section 47 of the Law of Waters of Puerto Rico to Section 44 of the Spanish Law of Waters approved June 13, 1879; Enciclopedia Juridica Espanola (Seix) Vol. II, p. 293.

The petitioner admits in her petition that at present there is no decision of the Supreme Court of Puerto Rico in conflict with the judgment rendered by it in this case, but that if the Writ is granted, it "may probably be the object of a decision by this Hon. Supreme Court of the United States in conflict with the judgment rendered by the Supreme Court of Puerto Rico"; Petition, page 7. The same thing happens with all petitions of Certiorari as soon as the Writ is granted.

The Supreme Court of Puerto Rico adhered to the doctrine of the common law, that before a tenement bordering a stream can claim acquisition by alluvion, three definite conditions must be present, to wit: (1) the tenement should have as boundary the same river or stream claimed; (2) the land in dispute ought to form an integral part of the riparian tenement after the land abandoned and subject of alluvion has incorporated in the tenement farms, and (3) that the deposit of the land to which the alluvion referred to is deposited slowly or imperceptibly by the action of nature and not by the hand of man; Petition 23.

After the Supreme Court below had examined the evidence offered before the trial judge, it concluded "that in the present case all three conditions required for alluvion exist". Petition 25.[3]

Such being the conclusion of both courts below, the Supreme and the Superior Courts of Puerto Rico, what the petitioner pretends is a total review by this Hon. Supreme Court of the findings of facts which supported the Judgment rendered.

It is manifest that in this case there is a clear absence of

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[3] Oyuelos, Digesto, Vol. 2, pag. 105; Bonel y Sanchez, Codigo Civil Espanol, Vol. II, pag. 171; Manresa, Comentarios al Codigo Civil, Vol. 3, pag. 323, 7th Ed.; Gay de Montella, Tratado de Legislacion de Agua, Vol. 1, pag. 199; Enciclopedia Espanola de Derecho y Administracion, Vol. 2, pag. 580 and *County of St. Clair* v. *Lovingston*, 90 U.S. 46.

conflict of decisions and of any question of Federal Law which require a determination by this Hon. Supreme Court.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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